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No. 82-90

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

FRANK R. SARGENT,
Petitioner,

VS.

MARSHALL S. MAYER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: August 16, 1982

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QUESTION PRESENTED

Did the Court of Appeals err when, after reviewing the record, it concluded that despite the District Court's vigorous attempts to assist Petitioner in presenting his case at the trial below, Petitioner failed to present sufficient evidence to support a verdict in his favor in a diversity action for legal malpractice under applicable California law?

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STATEMENT OF THE CASE

A. The Facts Below

The critical facts underlying this litigation are set forth in the decision of the California Court of Appeal in *Great American Ins. Co. v. Sargent*, 3 Civ. 17097 (Cal. Court of Appeal, 3d Dist., July 27, 1979). This Court is respectfully requested, under Rule 201 of the Federal Rules of Evidence, to take judicial notice of the facts set forth in that decision, a copy of which (hereafter referred to as "Opinion") is attached as Appendix A.

Petitioner's primary underlying claim concerns the manner in which his former attorney, Respondent Mayer, handled a complicated interpleader action under California

statutory law. In particular, Petitioner asserts that certain claims by the insurer of his real property were wrongfully litigated in the state interpleader action, with the result that the interpleader court found that Petitioner had operated his restaurant wilfully and knowingly in a manner which increased hazards, that he committed fraud in his proof of loss submitted to the insurance company, that he failed to safeguard the property after the fire, that he failed to submit to an examination under oath pursuant to provisions of the policy, and that he was in material breach of the insurance policy and had forfeited his rights thereunder. (Opinion at 5.)

The California Court of Appeal specifically noted that the *state interpleader court* erred when it insisted (over Respondent's formal objection) that the insurer's claims be litigated in the interpleader action. (Opinion at 4-5, 10-11.) The California appellate court affirmed the judgment of the state interpleader court, but remanded the case with directions to enter new findings of fact and conclusions of law in which no reference was made to any breach of the insurance contract by Petitioner. (Opinion at 12.) Petitioner was thus free to litigate the issue in another forum.

B. The Proceedings Below*

Petitioner's federal diversity action against Respondent for professional malpractice was tried before a jury. Expert witnesses had been disclosed by each side prior to the

*As used hereafter, "CR" shall refer to Petitioner's Designated Excerpts From the Record below and to the trial briefs submitted by the parties (which briefs were cross-designated by Respondent in the Court of Appeals); "RT" shall refer to the Reporter's Transcript. Respondent, on August 3, 1982, requested certification and transmittal to this Court of the Petitioner's Designated Excerpts From the Record; Petitioner on July 16, 1982, requested certification and transmittal of the Reporter's Transcript.

trial. (CR 74:23-31; Petitioner's Trial Memorandum; Respondent's Trial Memorandum.)

At trial, Petitioner sought to introduce the deposition testimony of his expert witness. The District Judge denied that request because the purported expert had not been shown in the deposition to be qualified. (RT 7:17-10:16.) The court allowed Petitioner to present his witness for live voir dire (with the court's assistance) concerning his qualifications. (RT 18:8-19:10; CR 104:28-30.) The District Judge found that the witness was not competent to express an opinion as to the standard of care applicable to a technical area of the law founded upon California statutory procedure. (RT 27:17-28:24; 32:12-23.)

The District Court ultimately granted Respondent's motion for directed verdict, because (1) Petitioner had failed to produce expert testimony tending to establish the standard-of-care and proximate-cause elements of the malpractice action; and (2) there was no competent evidence before the court tending to prove these elements. (CR 92; RT 55:13-58:6.) Petitioner's motion for a new trial was denied.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. The appeal was briefed and argued on a record designated solely by Petitioner. After reviewing Petitioner's record and the briefs submitted by the parties, and after hearing oral argument, the Court of Appeals concluded that the District Judge had attempted vigorously to assist Petitioner in presenting his case and that Petitioner had failed nevertheless to produce substantial evidence to support his cause.

REASONS FOR DENYING THE WRIT

Petitioner has received the assistance of two courts, neither of which has found merit in Petitioner's claims. The instant Petition raises no colorable constitutional issues, highlights no decisional conflicts requiring resolution by this Court, concerns state law only, and presents no otherwise significant issues appropriate for review here. Accordingly, the Petition should be denied.

Petitioner clearly understood that expert testimony is required (except as to matters of common knowledge) both to establish the standard of care to which an attorney must adhere, and to show that the result achieved would have been different but for the attorney's breach of the standard of care. (E.g., Pre-Trial Order dated Feb. 26, 1980 (CR 72-77); Petitioner's Trial Memorandum; *Kirsch v. Duryea*, 21 Cal.3d 303, 146 Cal.Rptr. 218 (1978); *Lipscomb v. Krause*, 87 Cal.App.3d 970, 151 Cal.Rptr. 465 (1978).) The record chosen by Petitioner reflects that the District Court went to great lengths to explain the rule to Petitioner, assist Petitioner in establishing the qualifications of his expert witness, and even aid Petitioner in presenting his case. (E.g., RT 29:13-24; 31:21-32:4; 25:1-26:6.) The District Judge's efforts were noted by the Ninth Circuit Court of Appeals, following its review of the trial transcript. (Petitioner's Appendix A, at 2a.)

Petitioner's record further demonstrates that the District Court properly concluded that Petitioner failed to demonstrate (by way of expert testimony or otherwise) how Respondent's conduct, even that for which expert testimony arguably might not have been required in order to estab-

lish the standard of care, affected the outcome in the state interpleader court. The District Judge explained as follows:

> "What the Court is having great difficulty with in seeing your position, Mr. Sargent, is that you *assume* you get over the first hurdle that the Court could or the jury could say I don't need any expert to tell me that the standard of care has been violated. He forgot, he simply without excuse or reason forgot to do something that everybody knows he should have done. That's only step number one. Step number two is, if he had done the thing which we all agree he should have done, is there a reasonable likelihood or probability that the result in the trial court would have been different. You are really asking me to say it would have been different. I can't supply the evidence for you, you have to establish that for the jury, and a lay person is really not competent to express an opinion that the results would have been different if the lawyer had done it a different way.
>
> "I might say for whatever it may be to anybody in the case, after reviewing the transcript of the underlying case in Shasta County, I found it to present enormously complex legal and factual issues. There were a great mass of pleadings for a trial that lasted two days. There are three volumes, three substantial volumes of the clerk's transcript with all types of pleadings, memoranda of points and authorities and briefs. It was obvious that the trial court disagreed with counsel, did not see counsel's position on the case." (RT 55:13-56:11; emphasis added.)
>
> . . . .
>
> "I agree with you that if the trier of fact accepts your testimony that you were misinformed of the trial date and showed up on the wrong date, and also if the

trier of fact believes that you were falsely or erroneously told that all of the issues in the San Francisco case were adequately protected and they weren't, *maybe* you wouldn't need expert testimony to say that violates the standard of care. *But you still need expert testimony for the next step,* and that is, if he had done it exactly the way you, Mr. Sargent, claimed he should have done it, is there any evidence before the Court, any competent evidence that the result in the trial court would have been different; is there any evidence before the Court that if Mr. Mayer had proceeded, as you say, vigorously and properly, he could have gotten the case dismissed?

"There is no such competent evidence before the Court, . . ." (RT 57:12-58:1; emphasis added.)

The District Court did not abuse its discretion in holding that the expert was not qualified to testify with regard to the standard-of-care or proximate-cause issues in the case. Under both federal and state law, a ruling as to the qualification of an expert witness is within the sound discretion of the trial court and will be overturned only where "clear abuse" is shown. (Rule 104, Federal Rules of Evidence, and Advisory Committee notes to subdivision (a) thereof; *e.g., Reno-West Coast Distribution Co. v. Mead Corp.,* 613 F.2d 722, 726 (9th Cir. 1979), *cert. denied,* 444 U.S. 927, 100 S.Ct. 267 (1979). Sections 405 and 720 of the California Evidence Code, and Assembly Committee comment to § 405; *e.g., Miller v. Los Angeles County Flood Control District,* 8 Cal.3d 689, 701, 106 Cal.Rptr. 1, 8-9 (1973).) The District Court properly applied the rule for qualification of an expert witness, particularly where (as here) an esoteric area of state statutory law was involved.

Petitioner's argument that he demonstrated Respondent's breach of the standard of care through reliance upon Respondent's own testimony and that of Respondent's expert is entirely unsupported by the record. It is significant, indeed, that neither the Court of Appeals (which reviewed the transcript of the trial court) nor the District Court (which heard and reviewed the testimony of Respondent Mayer and his expert witness) found any evidence that tended to prove the elements of Petitioner's action. (E.g., Petitioner's Appendix A, at 2a; RT 58:1-6.)

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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By: DOUGLAS R. YOUNG
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Marshall S. Mayer

Dated: August 16, 1982.

(Appendix A follows)